

195

REC'D		O.H.R.C.	
INITIAL	DATE	INITIAL	DATE
JUN 20 1984			

ONTARIO HUMAN RIGHTS CODE

R.S.O. 1970, Chapter 318, as amended

IN THE MATTER OF

The Complaint made by Mr. G. Almeida of Scarborough, Ontario, alleging discrimination in employment by the Chubb Fire Security Division of Chubb Industries Limited, 777 Dundas Street East, Toronto, Ontario.

A HEARING BEFORE

Professor John D. McCamus, appointed a Board of Inquiry into the above matter by the Minister of Labour, the Hon. Robert Elgie, to hear and decide the above-mentioned complaint

Appearances:

Mr. A.C. Millward
Mr. D.A.J. D'Oliveira

Counsel for the Ontario
Human Rights Commission
and Mr. G. Almeida

Ms. M. Eberts

Counsel for the Fire
Security Division of
Chubb Industries Limited

INDEX

			<u>Page</u>
I.	Introduction	....	1
II.	Issues of Law	....	3
III.	Appointment as Assistant Controller	....	9
IV.	Early months at Chubb	....	15
V.	The Pogson appointment	....	18
VI.	Collateral evidence of bias	....	21
VII.	Almeida's qualifications in February, 1974		33
VIII.	The Bartlett appointment	....	37
IX.	The Ross appointment	....	41
X.	The Horner appointment	....	45
XI.	The Almeida dismissal	....	54
XII.	The compensation question	....	58
XIII.	Other remedies	....	63
XIV.	The Order	....	65

I. Introduction

The Complaint which led to the establishment of the present Board of Inquiry alleges that the respondent engaged in discriminatory acts in failing to promote and ultimately in dismissing the complainant, Mr. Ganganelli Almeida. Mr. Almeida is a man of East Indian ancestry, born in Tanzania, educated in India, who worked in the accounting field in India and Tanzania prior to his emigration to Canada in 1971. From June of 1973 until May of 1979, Mr. Almeida was employed by the respondent, Chubb, as an Assistant Controller. During that period of time, four new Controllers were appointed by the respondent. In each instance, an individual of Caucasian or white ancestry was appointed to the position and it is alleged by the complainant and by The Ontario Human Rights Commission that the complainant was quite well qualified for the position of Controller and that the failure of the respondent to appoint Mr. Almeida to that position was motivated by a discriminatory attitude. Ultimately, on May 7, 1979, the respondent dismissed Mr. Almeida from his employment. It is alleged by the complainant that this dismissal was also motivated by a discriminatory bias.

The complainant and the Commission allege that this conduct constitutes a contravention of Section 4(1) (c) (f) and (g) of The Ontario Human Rights Code. These provisions stipulate as follows:

4(1) No person shall,

...

(b) dismiss or refuse to employ or to continue to employ a person;

(c) refuse to train, promote or transfer an employee;

...

(f) maintain separate lines of progression for advancement in employment or separate seniority lists where the maintenance will adversely affect any employee; or

(g) discriminate against any employee with regard to any term or condition of employment, because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such person or employee.

The formal Complaint (Exhibit 2) suggests that Mr. Almeida was discriminated against on the basis of race, colour, nationality, ancestry or place of origin.

For its part, the respondent denies the allegation that the decisions to promote others and ultimately to dismiss Mr. Almeida were motivated by a discriminatory bias. It is the respondent's position that Mr. Almeida's performance as Assistant Controller was not such as to warrant promotion to the Controller post and, moreover, that his performance deteriorated significantly during the latter period of his service as an employee and that the decision to dismiss was exclusively motivated by considerations of this kind. The respondent does not contest the proposition that if the facts are as alleged by the complainant and the Commission, such facts would constitute a contravention of the provisions of The Ontario Human Rights Code.

There is, then, extensive disagreement between the parties on material questions of fact. It will be necessary to consider in this decision at some length the rather extensive evidence led by the parties in setting forth the findings of fact necessary to determine whether the complainant and the Commission have established, on the balance of probabilities, that the alleged contravention of the Code

has occurred. Before turning to consider these matters, however, it will be useful to identify and briefly comment upon two material issues of law relating to the burden of proof assumed by the complainant and the Commission in a case of this kind.

II. Issues of Law

In the submissions of counsel for the parties, two issues surfaced for discussion. First, submissions were made with respect to the question of whether the complainant in cases such as the present is obliged to establish that the prohibited grounds of discrimination constituted the sole or exclusive basis for the respondent's decision to not promote or dismiss, or whether, on the other hand, it is sufficient for the complainant to establish that the prohibited ground was one of a number of considerations which led to the decisions in question. Second, submissions were made with respect to the question of the extent to which the burden of proof or of persuasion may shift to the respondent as the result of the establishment of a prima facie case by the complainant.

With respect to the first point, it would appear that counsel for all parties are in agreement with the view, which I take to be the proper one, that it is sufficient for a complainant to establish that the prohibited ground of discrimination constituted only one among a number of factors leading to the decisions which are the subject matter of the complaint. This view has been expressed by previous Boards of Inquiry established both in Ontario and elsewhere in Canada, often in reliance on a decision of the Ontario Supreme

Court in Regina v. Bushnell Communications Limited (1973) 1 O.R. (2d) 442 (H.C.), a decision which was upheld by the Ontario Court of Appeal (1974), 4 O.R. (2d) 288, which considered the nature of the finding necessary to establish that an employer has contravened a section of the Canada Labour Code prohibiting employers from dismissing employees because of trade union activities. The trial judge indicated that it was necessary to establish only that "membership in a trade union was present to the mind of the employer in its decision to dismiss, either as a main reason or one incidental to it, or as one of the many reasons regardless of priority" at p. 447, whereas the Court of Appeal expressed the point in the language of "proximate cause". Evans J.A. stated that "Union membership must be a proximate cause for dismissal, but it may be present with other proximate causes." See, generally, J. Keene, Human Rights in Ontario (1983) at pp. 299-301. The point of Bushnell and the human rights decisions relying on it, is that although the prohibited ground of decision-making must have some causal role or influence in the decision made, it need not be the exclusive cause of or influence on the decision. Indeed, as is suggested in Bushnell itself, it is not necessary to establish that the prohibited ground was the main reason for the decision in question. This is not to say, however, that the mere fact that an individual responsible for an impugned decision possesses discriminatory attitudes will itself discharge the complainant's burden of proof. The Code regulates certain forms of conduct, not certain forms of thought, and it is therefore necessary to establish that the attitude in question was causally

related to the decision in question.

On the other hand, if it be established that a discriminatory attitude does play a causal role, it would not be a sufficient defence for the respondent to establish that there were other good and sufficient grounds for the decision in question on which the respondent could have exclusively relied. It is an interesting question whether, in such a case, the fact that there were in existence good and sufficient non-discriminatory grounds for the decision which could have been, but were not in fact, relied upon is a factor which should be taken into account in exercising the discretion and conferred upon the Board by Section 14(c) of the Code to "make compensation" for injuries resulting from a contravention of the Code. This question, which is discussed at length in M.S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, (1982), 82 Col. L. Rev. 292, is one to which we shall return.

The second question on which counsel made submissions also does not appear to be the subject of serious disagreement between them. Counsel agree, as do I, with the proposition that the burden of proof in these cases remains with the Commission and the complainant to establish that contravention of the Code has, on the balance of probabilities, occurred. Nonetheless, I am also of the view that if the complainant and the Commission can establish a prima facie case of discrimination, a secondary burden of "going forward" or adducing evidence of non-discriminatory grounds for the conduct under question falls upon the respondent. If this burden is discharged by the respondent, it then remains for the complainant and the Commission to establish, on the balance of probabilities,

that the reasons offered by the respondent are not the true explanations for the decision in question. As is often said in equivalent American case law, it is open to the complainant to establish that the reasons offered by the respondent as an explanation for the decision in question are "pretextual" in the sense that they constitute a pretext for the decision which masks the role played by discriminatory attitudes in the mind of the decision-maker.

The nature of the prima facie case which must be established before a burden of adducing evidence is to fall upon the respondent has been the subject of discussion in American cases interpreting Title VII of the Civil Rights Act of 1974, a federal statute which is in material respects similar to the Ontario Human Rights Code. In McDonnell Douglas Corporation v. Green (1973), 93 S.Ct. 1817, Mr. Justice Powell (at p. 1824) articulated the elements of a prima facie case in the context of an allegation of discriminatory hiring practices in the following terms:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing

- i) that he belongs to a racial minority;
- ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- iii) that despite his qualifications, he was rejected; and
- iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.

Once such facts are established, the inference is irresistible that discriminatory considerations were involved unless some

explanation is forthcoming from the respondent. With appropriate modifications, it is my view that the McDonnell Douglas test can serve usefully in the present context of a complaint concerning refusal to promote and ultimate dismissal.

As far as the refusal to promote is concerned, the articulation of a prima facie case might appear to be complicated by the fact that in each case of appointing a controller, there would normally be a competition among several qualified applicants or candidates for the promotion. The selection of a Controller might be thought to involve delicate judgment based on a variety of criteria such as initiative, leadership skills, etc. which might seem to complicate the determination of whether a prima facie case has been made out. The McDonnell Douglas test appears to function quite satisfactorily in the context of what might be described as lower level positions where one would expect the employer to hire the first qualified applicant. When the employer does not do so in the case of a member of a minority group, circumstances are understandably thought to be suspicious and a prima facie case is established. It might be thought that in the context of a serious competition for a high level job, the failure of a particular candidate might not so easily arouse suspicion. My own view, however, is that the McDonnell Douglas test ought none the less to apply mutatis mutandis, to decisions of this kind as well. Indeed, it might be argued that the vagueness or open texture of the criteria that are likely to be applied in such contexts, together with the fact that the identity of the candidate pool and the knowledge of the criteria applied are likely to remain within the knowledge of the respondent, make the case for the application of a

version of the McDonnell Douglas analysis a very persuasive one in the context of promotions of this kind. There is a serious risk, in my view, that loosely defined or, indeed, non-existent criteria for promotion may provide a convenient mask for subjective considerations, including those of a discriminatory nature. On the other hand, a too-ready assumption that bias is at work may impose an almost insuperable burden on the employer who is the subject of a complaint. The striking of an appropriate balance in assessing employer conduct in this context is a question of considerable subtlety.

The difficulties of translating judicial interpretations of these legislative provisions which have developed principally in the context of decision-making concerning low level jobs into the context of adjudications concerning hiring or promotions into more senior or professional appointments have been extensively analysed on the basis of American experience by E. Bartholet, Application of Title VI to Jobs in High Places (1982) 95 Harv. L. Rev. 945.

It is unnecessary to explore these difficult questions further in the present context, however, for, as will be seen, the allegations of the complainant, if true, would unquestionably have established a prima facie case. Moreover, the respondent did, in any event, bring forward evidence of non-discriminatory reasons for the decisions not to promote and to dismiss, and it was accepted by counsel for the complainant and the Commission that these parties then resumed a burden to establish that the alleged reasons were pretextual and that, on the balance of possibilities, a discriminatory bias played a causal role in the decisions taken by the respondent. It is therefore unnecessary to consider what presumptions might have been available to the complainant and the Commission if the respondent had failed to adduce any evidence of this kind.

III. Appointment as Assistant Controller

When the complainant Almeida emigrated to Canada in June of 1971, his previous experience included approximately five years of service as the Controller of Tanita Co. Ltd., a private Italian corporation, at its location in Dar es Salaam, Tanzania. The principal business of Tanita was the operation of a large cashew nut processing plant. The company had a staff of some 1,400 people. Prior to this, Mr. Almeida had served in a variety of capacities in the accounting field, perhaps the most responsible position being that of Secretary Treasurer and a director of Italwood Limited, a private corporation, again located in Tanzania, much smaller in size than Tanita, engaged in the manufacture of flooring materials. Mr. Almeida's educational qualifications included a Bachelor of Commerce from Bombay University, majoring in accounting and auditing, and partial completion of the examinations for the ACMA degree, an English accounting qualification, which Mr. Almeida had commenced in 1968.

Within a few months of his arrival in Canada, Mr. Almeida secured employment at York Cablevision Limited. He began employment there as an accountant-clerk and within three months had been promoted to Accounting Supervisor. Subsequently, in February of 1973, Mr. Almeida moved to Auto Electric Services Co. Ltd., an automotive parts distributor having fifty branch outlets throughout Canada, as Chief Accountant, where he was, according to his resumé (Exhibit 4) "responsible for entire centralised Regional accounting function at the company's national head office at Downsview, Ontario. The post was created following a recent administrative reorganization;

it involved setting up improved methods of collecting, recording, as well as reporting financial information." During this period, Mr. Almeida began work on the R.I.A. degree course of the Society of Industrial Accountants of Ontario and had made considerable progress towards the successful completion of the requirements for that degree.

Against the background of this experience and with these qualifications Mr. Almeida responded in June, 1973, to an advertisement placed by the respondent, then known as Pyrene Canada Limited, inviting applications for the position of Assistant Controller. The plaintiff was interviewed for this position by Mr. Elgin Baker, then General Manager of Pyrene, and obviously made a favourable impression on Mr. Baker. Notations on Mr. Almeida's resume, apparently made by Mr. Baker, indicate that very positive references had been obtained by him from the controllers at both Auto Electric Services Co. Ltd. and York Cablevision Limited. Mr. Almeida was offered and he accepted the position of Assistant Controller at Pyrene on June 25, 1973.

The circumstances of this original appointment anticipate, in two respects, the difficulties which were to follow. First, it is apparent that Mr. Almeida entered into his new employment with Pyrene in the expectation that, at the very least, ultimate promotion to the position of Controller was a very real possibility. Thus, the original advertisement (Exhibit 5) had referred to "excellent promotional opportunities". Moreover, it was Mr. Almeida's evidence that Mr. Baker indicated that he wanted to appoint a man with

ambition, someone "who's pushing the Controller for his job" and that he, Almeida, indicated that he was very much that sort of person. Mr. Baker died in July of 1974 and it is accordingly only Mr. Almeida's evidence on this point which is available to this Board of Inquiry. Although Mr. Almeida's evidence of Mr. Baker's representations are evidently hearsay, I am satisfied that in other respects Mr. Almeida's evidence is generally reliable on factual matters and am therefore prepared to hold that representations of this kind were made. Certainly, there can be no doubt that, on the evidence of other Chubb officials, the prevailing Chubb policy at this time and subsequently was one of promoting from within where possible and it would not be surprising, therefore, if Mr. Almeida were encouraged in the belief that his promotion to the Controller position was at least a serious possibility. Counsel for the respondent has argued that Mr. Almeida gained at this time a very unrealistic expectation concerning the prospects for promotion, indeed that he felt that he was virtually entitled to such promotion and that this unrealistic expectation led to a level of frustration and disappointment when Mr. Almeida was not promoted for which Chubb bears no responsibility and which undermined his relationship with Chubb officials. No doubt there was some room for misunderstanding on this point, as indeed there may well be between employers and employees more generally, but there is nothing in the record to suggest that Mr. Almeida did not appreciate, for example, that ultimate promotion would require successful performance of the responsibilities of Assistant Controller and a demonstration of a capacity to carry the more

senior responsibilities. Again, it is my finding that an expectation on the part of the complainant that promotion was a serious possibility was a reasonable one in the circumstances and one induced by the respondent.

A second question which apparently surfaced at this time was the issue of ethnicity and hiring policy. Mr. Almeida testified that the question of hiring someone of his ethnic background was raised by Mr. Baker in their interview in the following manner (at pp. 57-58 and 60):

A:
 after a brief further discussion of various aspects of the job I was getting into, Mr. Baker said he was fairly convinced I could do the job but he had a little suspicion I might have some difficulty in some regard, so he said to me, 'This is a British-owned company and there is a lot of Englishmen working here and I am a little concerned that you might have problems getting along with them. How would you be able to deal with a situation like that?' So I said, 'Mr. Baker, I have no problem dealing with Englishmen because I have been in the Colonies for the last twenty years. So I have been constantly working with them, so we know what they are like, and I don't personally imagine there's going to be a problem.'

 So he said, 'Well, I would like to make sure from the management point of view whether they would be prepared to accept you', and he suggested that he was going to have a word with the Vice-President of Chubb Fire which was a Mr. Ian Lloyd at the time.

THE WITNESS: Can I elaborate on that a little bit as to why Mr. Baker said it?

 He did say to me - and these are his exact words: 'I am a Canadian and to me everybody is equal. I don't care where you come from or who you are. If you can do the job, I want you.'

But he said, 'Not everybody is the same and this is an English company; there's lots of English people here who don't hold that view. So you might have problems with them.' And that is how he led me into believing that that might be a point.

Q: MR. MILLWARD: Well, after that discussion what happened in respect of your employment at Chubb?

A: Well, he didn't offer me the job at the time, he told me that he would get back to me and I was quite keen on hearing from him and eventually I rang him a few days later and he said, 'Okay, come along. We'll discuss the job.'

And he called me in on Friday, I believe, and he offered me the job and he suggested that I had to meet the Controller, Mr. Wilkinson, but he said, 'Don't worry. I already told him that I am taking you on. It is just a formality since he is the Controller.'

....

On cross-examination, Mr. Almeida was asked to return to this subject and the following exchange occurred (at pp. 180-181):

Q: You said in your examination-in-chief that Mr. Baker told you that he would like to make sure from a management point of view whether they would be prepared to accept you. Have I got that right?

A: Yes.

Q: Okay. He also told you, did he, that he was going to speak with the Vice-President of Chubb Fire Industries, Mr. Lloyd, on this subject?

A: He didn't mention the name 'Lloyd'. He mentioned the Vice-President, but subsequent to going to Chubb I met Mr. Lloyd.

Q: And you put two and two together that --

A: That Mr. Lloyd was the Vice-President then.

Q: Did he tell you that he was going to speak with any one else at Chubb Fire beside the Vice-President?

A: No he didn't.

Q: Did Mr. Baker ever tell you about the nature or the contents of the conversation or any conversation you might have had with the Vice-President on this?

A: Yes, he mentioned to me when he finally offered me the job, that Mr. Lloyd said 'If you think that he is the best candidate I don't see any reason why we shouldn't select him.'

Counsel for both parties attempted to draw some support from the general nature of this alleged exchange between Mr. Almeida and Mr. Baker. As might be expected, counsel for the Commission and respondent relied on it as some evidence of sensitivity in the respondent at the time in question with respect to the appointment of non-white candidates to more senior positions. At the time in question, the accounting area did have some non-white employees, but all of them were below the Assistant Controller level. The fact that Mr. Baker felt that it was necessary to make enquiries on this point suggests, it is argued, that an appointment at the Assistant Controller level was approaching an area where racial discrimination might be operative and accordingly, that Mr. Baker felt that enquiries were necessary. To be sure, the ultimate decision to hire indicates an absence of discrimination. Nonetheless, it is argued, the apparent sensitivity of the respondent on this issue suggests that these discriminatory attitudes might become engaged with respect to appointments at more senior levels.

Counsel for the respondent, on the other hand, argues that whatever the value of this evidence might be, it does suggest an absence of a hiring policy based on discriminatory considerations.

If Mr. Baker felt it necessary to make enquiries, at least they produced the appropriate response from Mr. Lloyd, i.e., that the policy is to hire the best man.

Accepting, as I do, that an exchange of this kind between Mr. Almeida and Mr. Baker did occur, it is perhaps a bit surprising that so many years after the enactment of human rights legislation in Ontario, a responsible official in a large company of this kind would so apparently guilelessly indicate that his employer might engage in conduct which would constitute a clear contravention of the Human Rights Code. Nonetheless, given the hearsay nature of the evidence and given the ambiguity of its significance, it is my view that neither party can draw much support from it. It would be surprising, however, if someone in Mr. Almeida's situation would not be a bit startled or offended by the nature of these enquiries and, once on the job, a bit suspicious of the fairness of decision-making processes at senior levels.

IV. Early months at Chubb

Mr. Almeida's performance during his early months as Assistant Controller at Chubb appears to have been considerably successful. Mr. Wilkinson, the Controller under whom Mr. Almeida worked until Wilkinson's departure in February of 1974, was a reluctant witness before this Board of Inquiry for reasons to be considered further below. Mr. Wilkinson testified that Mr. Almeida discharged his responsibilities satisfactorily during their time at Chubb together. Mr. Campbell, the Cost Accountant during this period, testified that Mr. Almeida performed his job capably. More importantly, it would

appear that after Mr. Wilkinson left, Mr. Almeida assumed and ably discharged many of Mr. Wilkinson's responsibilities during the interregnum before the appointment of a new Controller. The responsibilities shouldered by Mr. Almeida during this period were made considerably more burdensome by the fact that shortly before Mr. Wilkinson's departure, the Credit Manager, Mr. Brennan, had also left his position and shortly after, the Cost Accountant, Mr. Campbell and the Assistant Cost Accountant, Mr. Argentini, also left their positions and created gaps that Mr. Almeida was required to fill. Mr. Almeida was not left on his own in this situation. An individual named Scott from the corporate head office was appointed Interim Controller but, although there is some conflict in the evidence on these matters, there does not appear to be much room for doubt that Mr. Almeida shouldered a very considerable burden at this time, including some of what were formerly Mr. Wilkinson's responsibilities, and did so admirably.

Mr. Baker was evidently very pleased with Mr. Almeida's performance. Mr. Almeida testified that Mr. Baker called him in and indicated he was very appreciative of Mr. Almeida's work. A confirming memorandum dated May 6, 1974, from Mr. Baker to Mr. Almeida, entered as Exhibit 12, stated the following:

This will confirm our discussion today in which I indicated to you the fact that the management deeply appreciates the fact that considerable responsibility has fallen on your shoulders in the last few weeks in the Accounting Office. Notwithstanding the fact that there was a sizeable increase effective April 1st, I am pleased to confirm that there will be a further \$600 increase effective July 1st, and another \$600 increase effective October 1st. At the latter date this will bring your annual remuneration to a level of \$15,000.

A photocopy of an earlier memorandum, entered as Exhibit 13 from Mr. Baker to Mr. R.G. Lewis, then President of Pyrene, dated April 26, 1974, requested this increase in Mr. Almeida's salary in the following terms:

With the difficulties under which we are apparently operating due to the loss of Wilkinson, Campbell, and Argentini, I am requesting that we move immediately to adjust the salary of Gangi Almeida, Assistant Controller. Gangi joined Pyrene in July of 1973 at a salary of \$12,000 per year. This was an increase from his previous position, but it was appreciated here that our chances of getting a Canadian with similar qualifications at that price were essentially nil.

On April 1st Gangi's salary was adjusted upward by \$1,800 per year to a total of \$13,800. Because he is now the mainstay in this department, and because he will shortly be trying his final exams for his R.I.A. Gord and I are recommending that his salary be adjusted as noted below, to preclude the chances of losing this valuable employee.

We are recommending that he immediately be given a \$600 a year increase effective May 1st, with an additional \$600 to be given upon successful completion of his final exam and attaining the R.I.A. designation. The latter is expected to be in July. This would increase Gangi's annual salary to a level of \$15,000 a year, which we feel is sufficient.

Again, the evidence is hearsay in nature but the evidence led on behalf of the respondent has not seriously challenged the proposition that Mr. Almeida's work during this period was very successful and viewed as such by the executives to whom he reported.

V. The Pogson appointment

A new Controller, Mr. Pogson, assumed his responsibilities on July 15, 1974. The decision to appoint Mr. Pogson was made by Mr. Davies, the Vice-President of Finance of Chubb at that time and indeed during the rest of Mr. Almeida's time at Chubb. In his testimony, Mr. Davies indicated that Chubb operated on the basis of a policy to promote from within where possible and further, indicated that when considering possible replacements for Mr. Wilkinson, he considered the possibility of promoting Mr. Almeida. Given the apparently enthusiastic reception of Mr. Almeida's work by Mr. Baker, it is of no little interest in the present context to discern the reasons for the rejection by Mr. Davies of Mr. Almeida as a candidate for this promotion. Mr. Almeida testified that Mr. Baker indicated to him that he would be recommending Mr. Almeida as a replacement for Mr. Wilkinson but there is no direct evidence that this view was expressed by Baker to Davies directly.

In the event, however, Mr. Davies did consider Mr. Almeida's suitability for a promotion to Comptroller at this time. The following explanation for rejecting this possibility was offered by Mr. Davies in his examination-in-chief in the following terms (at pp. 987-988):

Q: Did you consider, apart from any discussions you may have had with Mr. Wilkinson, did you consider Mr. Almeida for the controller's position upon Mr. Wilkinson's departure?

A: I did.

Q: What decision did you make?

A: I found, in my opinion, he was not suitable for that job.

Q: Upon what basis did you make that decision?

A: At that time I believe it was two-fold. One was his ability to get along with people - I can't give an honest answer on this, I don't recall about the technical ability whether I was able to judge it at that time or not. It was fairly soon after he came, but I would suspect that that was probably the other reason that he had not been here long enough to form an opinion.

Q: When you say 'at that time' you were concerned about his ability to get along with people. Do you recall any particulars of that concern?

A: No, I don't. I think probably at that time it would be more his length of time with the company than anything else.

Two reasons for rejection, then, are suggested. First, Mr. Davies indicates that Mr. Almeida demonstrated an inability to get along with people. Second, it is said that he had not yet served enough time with the company.

Counsel for the complainant and the Commission has argued that this justification for dismissing the possibility of appointing Mr. Almeida at this time is clearly pretextual. With respect to Mr. Almeida's difficulty in getting along with people, there is simply no evidence in the record that would substantiate this claim. Indeed, in the passage quoted, Mr. Davies himself appears to essentially withdraw from this suggestion when asked for particulars. Mr. Davies was similarly unable to provide particulars on cross-examination. In fact, such evidence as there is in the record concerning Mr. Almeida's ability to get along with people during this period suggests that no difficulty of this kind was present. Mr. Almeida obviously had a very successful relationship with Mr. Baker. Mr. Wilkinson's testimony indicates that Mr. Almeida

got along very well with him. Inasmuch as it seems most likely that any assessment Mr. Davis would have received concerning Mr. Almeida would come either from the General Manager, Mr. Baker or the Controller, Mr. Wilkinson, it seems very unlikely that negative assessments had been received by Mr. Davies. The suggestion that Mr. Almeida had demonstrated a deficiency in this area at this time is simply not credible.

The second explanation for Almeida's rejection - the fact that he had not yet been with the company for very long - is also unsatisfactory. One must ask whether, as a general matter, Chubb was unwilling to appoint to the Controller position individuals who had very little or no service with the company. The answer to this question seems clearly to be no. Mr. Wilkinson was appointed to the Controller position after only one week of service as Assistant Controller. Although this was dismissed by counsel for the respondent as something of an "emergency situation", it is not at all clear why the disappearance of Mr. Wilkinson's predecessor was any more of an "emergency" than the eventual disappearance of Mr. Wilkinson. Moreover, in all of the instances in which controllers were appointed during Mr. Almeida's period of employment at Chubb, the individual appointed was an individual with no previous Chubb experience.

In short, the reasons for rejecting Mr. Almeida for the Controller position offered by Mr. Davies simply do not bear scrutiny. Indeed, the unsatisfactory nature of these explanations is, in itself, persuasive evidence in support of the proposition

that the respondent's decision to refuse to promote Mr. Almeida was motivated, on the balance of probabilities, by discriminatory considerations.

VI. Collateral evidence of bias

In addition to the pretextual nature of the reasons offered by the respondent for refusing to promote Mr. Almeida after the completion of Mr. Wilkinson's service as Controller, there is some evidence, albeit of an indirect and, for the most part, hearsay nature, for the existence of discriminatory bias standing in the way of a promotion for Mr. Almeida. Mention has already been made of the curious conversation Mr. Almeida had with Mr. Baker concerning the appropriateness of appointing a man of Mr. Almeida's ethnic background to the Assistant Controller's job and to the difficulty in drawing any particular inference from that exchange. Other incidents recounted by various witnesses in these proceedings are, however, less ambiguous in nature.

Mr. Campbell, the cost accountant who resigned shortly after Mr. Wilkinson, testified that he had a conversation with Mr. Wilkinson in which the latter indicated the existence of a bias of this kind. Mr. Campbell's evidence on this point was as follows (at p. 438 of the transcript):

Q: And during the time that you were at Chubb did you have occasion to have a conversation with Mr. Wilkinson who was the Controller about the hiring of employees at Chubb?

A: Yes we did.

Q: And what was the subject - what was discussed between you and Mr. Wilkinson and what did

Mr. Wilkinson say to you about hiring of employees at Chubb?

A: I was told that we had had enough inter-race; that we should hire whites from now on.

Q: You were told by Mr. Wilkinson that you had enough what?

A: Inter-race; in other words, enough mixtures; that we should hire whites from now on.

Q: And did Mr. Wilkinson say anything further?

A: Well, we were out at the time and he had said that he had been told by Mr. Lewis in conversation that we should not hire any more colours; that we should hire whites and as far as Mr. Almeida was concerned that he would not become Comptroller.

Q: As far as Mr. Almeida was concerned he would not become Comptroller?

A: That is correct.

Q: Who said that to you?

A: Mr. Wilkinson told that to me, and I guess he had gotten it from Mr. Lewis.

Q: Did you have any employees in your cost accounting section?

A: Yes I did.

Q: And did you receive any instructions in respect of any of your employees from Mr. Wilkinson?

A: No, because actually I didn't have any problem because all my employees were Anglo-Saxons, but I was told - here again, the reason for the conversation was that if I had to hire, not to hire anything other than Anglo-Saxons.

Q: Did you communicate this conversation to Mr. Almeida?

A: Yes, I did. When I had left the company or when I was leaving we had been out to lunch and I had told him not to bother wasting his time; that he should look elsewhere; that he wasn't going to go any further than what he was. I didn't tell him who told me that. I told him I heard it from a reliable source.

Q: You did not tell him that you had heard it from Mr. Wilkinson?

A: Correct.

Q: Since that time, have you spoken to Mr. Wilkinson about this conversation?

A: I approached Mr. Wilkinson about the conversation when I was first approached by - well, regarding this matter.

Q: And what, if anything, did Mr. Wilkinson say about what you should do?

A: Well, he asked if possible not to get him involved and I said if possible I wouldn't, but I did say that if I was under oath then I would tell the truth.

Mr. Wilkinson testified before this Board of Inquiry and as the last exchange between counsel and Mr. Campbell above quoted would indicate, he appeared to be a rather reluctant witness with respect to these matters. In the following excerpt from his testimony, Mr. Wilkinson indicated that both Mr. Lewis, then the Chief Executive Officer of this division of Chubb, and Mr. Davies had made reference to the composition of the accounting staff but Mr. Wilkinson appeared reluctant to draw any explicit connection between these sorts of exchanges and the conversation he had with Mr. Campbell concerning the ethnic composition of the staff and Mr. Almeida's prospects for promotion (at pp. 497-500):

Q: Now you indicated you had another conversation with Mr. Campbell before you were served with your summons. When was this conversation? How long before?

A: I think it was a couple of weeks before. It was right after he appeared as a witness, I believe.

Q: What did Mr. Campbell say to you?

A: He told me I had told him that Mr. Lewis had told me that Gangi would not be the Controller.

Q: What did you say to him?

A: I said to him that I could not remember telling him specifically Mr. Lewis had told me that.

Q: Did Mr. Campbell say anything else to you?

A: No.

Q: Now, you indicated that Mr. Lewis was the President. How often did you have occasion to meet with Mr. Lewis during the time he was Controller?

A: We met three or four times a month.

Q: What about Mr. Davies? How often did you have occasion to meet with him?

A: About three or four times, maybe three times a month.

Q: Where was your office situated, Mr. Wilkinson, in the Pyrene building?

A: It was on the second floor.

Q: What relationship physically did it bear to the rest of the accounting office?

A: It was a glassed-in office right beside, you know, one part of the Accounting Department, the general accounting, billing section.

Q: During the time that you were Controller, who would be visible from your office in the general accounting area?

A: The Assistant Controller.

Q: Was that Mr. Almeida?

A: Mr. Almeida, the Accounts Payable section. I think the billing people were there as well.

Q: Of the people that were visible to you, apart from Mr. Almeida, were there any other non-whites?

A: Yes.

Q: How many others were there?

A: At least one, maybe two.

- Q: Now, did you have occasion during the time that you were Controller to have any discussion with Mr. Lewis about the employees in the accounting area?
- A: Yes, I did.
- Q: What discussion did you have?
- A: He mentioned once that there seemed to be a lot of non-Canadians in the Accounting Department.
- Q: He mentioned there seemed to be a lot of non-Canadians?
- A: A lot of non-Canadians in the accounting section, the accounts section, I think he called it.
- Q: Did you ever have occasion to have a conversation with Mr. Davies about the employees in the accounting area?
- A: Yes. He mentioned once as well that, you know, kind of a joke, he wondered if I was practising discrimination against Canadians.
- Q: He wondered if you were practising discrimination against Canadians?
- A: Yes. It was kind of a joke. Well, I took it that way.
- Q: Did he say anything else?
- A: No.
- Q: Where was he when he said that to you?
- A: In the Controller's office.
- Q: Now, subsequent to these conversations, did you have occasion to have a conversation with Mr. Campbell?
- A: Yes, I had a conversation with him after I had handed my notice in.
- Q: This conversation was after you handed your notice in?
- A: Outside of work, outside.
- Q: Were you still working there at the time you had this conversation?
- A: I was there. It was the night before I was leaving.

Q: What did you discuss with Mr. Campbell during this conversation?

A: Well, the discussion came up about who would be the Controller. It was over a couple of drinks. I cannot specifically remember a lot of what I said, but I think I did indicate to him that it was my opinion that Gangi would not be the Controller.

Q: Did that opinion have anything to do with the conversations you had with Mr. Lewis?

A: No, I did not specifically think about it. It was just my opinion. I did not specifically think of that. Subconsciously I might have.

As between the two versions of the Campbell-Wilkinson conversation, I prefer the evidence of Mr. Campbell. Mr. Campbell appeared to be a credible witness and this, coupled with the evident defensiveness of Mr. Wilkinson's testimony, leads me to the conclusion that Mr. Wilkinson laboured under the belief that the hiring of non-white employees would secure the disapproval of his superiors and that this attitude of theirs was related to the poor prospects of Mr. Almeida for promotion. What is less clear, however, is whether Mr. Wilkinson's views in this regard were the result of something more substantial than the apparently casual remarks of Mr. Lewis and Mr. Davies reported in Mr. Wilkinson's testimony. In this respect, two points appear relevant. First, the generally defensive nature of Mr. Wilkinson's testimony suggests that there may well have been a more clear signal to this general effect from either Mr. Lewis or Mr. Davies than that recounted in Mr. Wilkinson's testimony. Secondly, although Mr. Wilkinson suggested that the remark of Mr. Davies was intended as a joke, no such suggestion was made with respect to the remark of Mr. Lewis. Both Mr. Lewis and Mr. Davies testified before this Board of Inquiry.

Mr. Davies conceded that he made the remark attributed to him by Mr. Wilkinson, but suggested that the remark was intended as a joke. Mr. Lewis indicated that he didn't recall making a comment of this kind. (Transcript, at p. 1283)

Counsel for the respondent has urged that these casual observations of Mr. Lewis and Mr. Davies ought not to be taken to be solid evidence of company policy in matters of this kind and there is, indeed, some force in this submission. At the very least, however, I am satisfied that Mr. Wilkinson, then serving as Controller with some responsibility for making employment decisions, had formed the opinion that further hirings of non-whites would not be viewed favourably and that on the basis of discriminatory considerations of this kind, Mr. Almeida was not going to be promoted to the position of Controller. It is of some interest, then, that others who had contact with Mr. Davies over the years with respect to hiring matters appear to hold similar opinions or to report somewhat similar incidents.

The evidence of Mr. Rick Hinton is especially troubling in this regard. Mr. Hinton, then an accounting student with Dunwoody & Company, worked on audits at Chubb in 1979. While working on the Chubb premises, Mr. Hinton had a conversation with Ms. Kathryn Muckle which he described in his evidence in the following terms (at pp. 453-454):

Q: Did you have occasion to discuss with her the hiring of persons in the Accounting Department at Chubb?

A: Yes.

Q: How did that come about?

A: Basically, that took place when I happened to be at home and I was reading The Star which we were receiving, and there was an ad -

Q: Just one second. Was this during the time that you were doing the interim audit?

A: Yes, it was. There was an ad in the Classified Section, a two-column ad for a Cost Accountant in Chubb, and naturally knowing cost accountancy and because we just happened to be doing the payroll audit and it seemed to fit in, I just happened to mention to her the following day that I spotted their ad, and I asked her -

Q: And what did she say?

A: I asked her what the response was like and she said they always have a large number of applicants, or respondents, let's say, for the ads that they ran.

Q: Did she say anything else?

A: Yes. She said to me that they have an awful lot of applicants apply but they don't fit their requirements, and I more or less gave her a look - 'What's the problem?', and she said to me 'That they are non-Whites - an awful lot of non-Whites applying, you know, that is not what they are looking for.' I went upstairs and I was quite taken aback by the comment, I guess, because it was so open, so frank, and I commented to Werner Penner, the senior, what I had been told. That was about it.

Ms. Muckle also testified in these proceedings and indicated that she could not recall making statements of the kind attributed to her by Mr. Hinton. Indeed, she indicated that she could recall very little of any conversation she might have had with Mr. Hinton. She did, however, testify with respect to what she thought might be the appointment process in question and indicated that the successful candidate was a Mr. Mohammed Baksh. However, Ms. Muckle's evidence with respect to the timing of this appointment strongly suggests that the appointment of Mr. Baksh was not the position under discussion at the time of Mr. Hinton's visit to Chubb. More generally,

the somewhat confusing nature of Ms. Muckle's testimony, her inability to recall with any clarity not only the troubling remarks attributed to her by Hinton, but virtually anything else about their contact during this period, together with the fact that Ms. Muckle has an obvious interest in minimizing or denying the operation of discriminatory attitudes at Chubb, lead me to place little reliance on her testimony. Mr. Hinton, on the other hand, is an independent witness who would appear to have no reason to mislead this Board of Inquiry. Accordingly, I am satisfied that the conversation with Ms. Huckle reported by Mr. Hinton occurred more or less as he described it and that Ms. Muckle, for whatever reason, had formed the opinion that the appointment of non-whites in the accounting area would not be favourably viewed by her superiors. Ms. Muckle, it should be added, reported at this time to Mr. Davies, who in turn reported to Mr. Lewis, the President of the Company.

Finally, counsel for the complainant and the Commission place some reliance on the concession made by Mr. Davies in his testimony (at pp. 1007, 1043 and 1046) that although he did not believe that he had ever given specific instructions to a recruiting agency to give preference to candidates with a particular background, he might well have joked about such matters in conversation with an agency representative. More particularly, Mr. Davies recalled that he had said something in a joking manner of this nature to the recruiting agent who eventually recommended the appointment of Mr. Ross as Comptroller in 1977, an appointment made by Mr. Davies. It is argued on behalf of the complainant that

the making of a joke in this context is a transparent device for signalling to the recruiting agent in question that non-white candidates are not to be actively sought. Counsel for the respondent, of course, argued that this is to place too much weight on a casual remark of this sort.

It is clear that the Ontario Human Rights Code does not prohibit the making of casual remarks or jokes, even tasteless ones, concerning ethnic groups or hiring processes. One must ask, however, how likely it is that such a joke would be made without the objective of sending a subtle signal to the recruiting agent. What would the comic premise of the jocular remark be? Would it be that since it is obviously unlawful to insist on such a requirement for employment, it is therefore obvious that the person making the remark is "just kidding" and that no serious suggestion along these lines is being made? Although this is plausible, it is not, in my view, a very likely joke nor does it seem very likely that such a remark would be received by a recruiting agent as being made with jocular intent alone. It is argued on behalf of the complainant and the Commission that jocular remarks of this kind represent a sophisticated attempt to signal discriminatory objectives to a recruiting agency. The instruction would be communicated but, in the event of some investigation of the matter, could always be dismissed as being based on remarks which were purely jocular in nature.

As might be expected, it is argued on behalf of the complainant and the Commission that Mr. Davies' remarks to the recruiting agent

are all of a piece with the remarks made to Mr. Wilkinson. With respect to the latter, although Mr. Wilkinson, too, was at pains to indicate that he viewed Mr. Davies' remarks as jocular in nature, I have made a finding that Mr. Wilkinson did in fact believe that appointments of non-whites would not meet with the approval of his superiors. While it is conceivable that Mr. Wilkinson misunderstood the significance of this or some other remark made by Mr. Davies or that remarks made to the recruiting agent were, in some innocuous way, intended merely for comic effect, one must ask whether this interpretation is likely to accord with the facts underlying these exchanges.

For obvious reasons, a Board of Inquiry such as this should be reluctant to place great emphasis on the significance of casual, off-hand remarks of this kind as evidence of the individual's state of mind in some other context. A proceeding before a Board of Inquiry is not an exercise in psycho-analysis. Moreover, matters of humour are, to some extent, matters of taste which will not be universally shared. Again, the underlying objective of the Code is not to prohibit discriminatory thought but to prohibit discriminatory action. Nonetheless, in the present context of something in the nature of jocular instructions to discriminate being given to a recruiting agency, it is my view that this is significant evidence of a discriminatory attitude on the part of the employer in the absence of evidence which persuasively suggests that the remark in question was innocuous in the sense that it did not carry with it any intention to signal an employer preference. If, for example, an employer is found to have said to a recruiting agent, "By the

way, no ethnics", albeit with a smile, the absence of an obvious comic premise for the remark coupled with the likely influence of such a remark on the mind of the recruiting agent, suggests that this should be taken as strong, though presumably not irrebuttable, evidence of an intention to signal a discriminatory requirement to the recruiting agency.

In summary, there is in addition to the pretextual nature of the explanation given for refusing to promote Mr. Almeida at the time of the Pogson appointment, some evidence in the record of these proceedings which suggests that individuals involved in making employment decisions on behalf of Chubb received the impression that the appointment of non-white candidates would not be well received either by Mr. Davies or Mr. Lewis and further, that Mr. Davies appears to have signalled a disinterest in non-white candidates to the recruiting agency that ultimately recommended the appointment of Mr. Ross. The pretextual nature of the explanation given for refusing to promote Mr. Almeida is, in itself, sufficient basis for the conclusion that discriminatory considerations were at play in the decision-making process. The evidence outlined in this section of the decision, whether or not it would in itself be sufficient to ground a similar finding, offers some support for that finding.

VII. Almeida's qualifications in February, 1974

It is my conclusion, then, that subsequent to the departure of Mr. Wilkinson from the Controller's position in February of 1974, consideration was given to the appointment of Mr. Almeida as his replacement but Almeida was rejected as a candidate on the basis of discriminatory considerations.

In considering whether the complainant should receive compensation of the kind requested by him, i.e., the difference between the salary he received as Assistant Controller and that which he would have received as Controller, it is material in my view to determine whether Almeida was in fact qualified for the position of Controller and therefore could have been promoted on a closer view of his qualifications and experience.

In this regard, it is important to note that at the time of Mr. Pogson's appointment, Mr. Almeida had not yet completed his R.I.A. degree. Exhibit 13, previously quoted, indicates that it was Mr. Baker's understanding that Mr. Almeida would complete the qualifications for the degree in July of 1974. Although this was in fact about the time of the commencement of Mr. Pogson's service as Controller it might well be that if a degree qualification was a requirement of the job, it would be reasonable for the respondent to refuse to await the outcome of the writing of Mr. Almeida's qualifying examinations. The respondent would not wish to be in the position of having appointed as Controller someone who had not successfully completed the degree and might not do so in the immediate future. The question then arises as to whether

or not a degree was a clear qualification for promotion to Controller.. On this point, the evidence is less than abundantly clear. First, it may be recalled that Mr. Davies did not mention this as a basis for rejecting Mr. Almeida as a candidate for the position. Mr. Davies' testimony with respect to the requirements for the job were stated in the following exchange taken from his examination-in-chief (at pp.1007-1008):

Q: What were you looking for in a Controller for Chubb Fire?

A: I was looking for someone with experience in that position who had actually worked in that position. Someone who would get along with the type of people that were working in that division. I think each division has its own personnel.

Q: Were you looking for any particular kind of accounting degree?

A: No, but an accounting degree, yes.

Q: And what kinds of accounting degrees would be acceptable?

A: At that point it would have been chartered accountant, registered industrial accountant - RIA, perhaps some English degree. Certified general accountant.

Q: Was past experience in a controller's position a sine qua non of being appointed?

A: It was.
....

Q: Why was that?

A: Well, I think we had learned some lessons through this trail of bodies over the period of time. We wanted someone with a track record who had exhibited that they could do the job.

Also, someone who had some stability with the company in a senior position.

Q: Now, when you say that experience in the Controller's position was essential, was that an essential

requirement as far as you were concerned right from 1973 on to 1982?

A: I don't recall. I don't think we would have put as much emphasis on it in the earlier years.

The reference to a "trail of bodies" relates, as far as one can gather, to the series of Controllers appointed during this period. The least successful of these, Mr. Thomas Ross, had not had a previous appointment as controller prior to his appointment at Chubb, and it may well be this experience which led Mr. Davies to adopt the view that previous experience as a controller was a sine qua non of the position at a later point in the period from 1973 on to 1982. Certainly the crystallisation of this requirement would appear not to have occurred until after the appointment and ultimate dismissal of Mr. Ross. In a memorandum announcing the appointment of Mr. Ross, Mr. Davies briefly described Mr. Ross' background - which did not include a previous appointment as a controller - and described him as "well qualified to face the tasks that lie before him" (Exhibit 31). Thus, there is no basis for suggesting that Mr. Almeida would have been subject to this requirement at the time of the appointment either of Mr. Pogson or Mr. Bartlett or, of course, Mr. Ross. Moreover, Mr. Almeida's resume does indicate five years service as the controller for a rather large Italian company located in Tanzania (Exhibit 4).

The apparent requirement that a candidate for controller possess a degree of some kind, however, appears to create more difficulty for Mr. Almeida. Although it is not clear from Mr. Davies' evidence whether the degree requirement, like the requirement

of previous experience, is something which was imposed as a result of increasing concern with the quality of individual being appointed to the Controller position. My own view, however, is that the degree requirement appeared to have an independent status and an unchanging status as a criterion for appointment so far as Mr. Davies is concerned. We may note, as well, that Mr. Wilkinson expressed the general opinion that, although policy on such matters may vary from one company to the next, it would be unusual for an R.I.A. student to be appointed to the position of Controller and he felt that this might have been a problem for Mr. Almeida.

I am persuaded, then, that had Mr. Almeida's candidacy for the position of Controller been carefully reviewed by Mr. Davies, there is some likelihood that he would have been rejected on the ground that he had not yet completed his degree. The fact that this point was not put plainly in the evidence of the respondent does, in my view, suggest that the issue is not clear cut. I am satisfied, however, that ^{at} the very least the complainant has failed to establish on the balance of probabilities that he was fully qualified for the position of Controller when Mr. Pogson was appointed in 1974. The significance of this finding, in my view, is not that no contravention of the Code had occurred at this time. Inasmuch as Mr. Almeida was considered for promotion and rejected on a prohibited ground, it is my view that a contravention did indeed occur at this point. The inability of the complainant to establish that he was fully qualified for the position in question, however, undermines his entitlement to compensation in the form of

lost wages at this point, inasmuch as he has not established that he could, in fact, have been promoted to the Controller's job at the time of the Pogson appointment. See, in support of this analysis, Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective, (1982), 82 Col. L. Rev. 292.

By the time of Mr. Pogson's departure in January of 1976, however, any disqualification that Mr. Almeida suffered as a result of failure to complete his R.I.A. degree had disappeared and it is to the circumstances surrounding the appointment of Mr. Adrian Bartlett to replace Mr. Pogson in March of 1976 that we must now turn.

VIII. The Bartlett appointment

The rejection of the possibility of promoting Mr. Almeida as Controller in early 1976 to replace Mr. Pogson must be viewed against the background of such additional information that the respondent employer may have had at this time concerning Mr. Almeida's suitability for the position and, against the background of what was conceded by Mr. Davies to be the company policy of promoting from within where possible.

Clearly, in some respects at least, Mr. Almeida's suitability for promotion would be more easily established in early 1976. By this time he had completed the examinations for his R.I.A. degree and he had established a very favourable track record under Mr. Baker, especially in the interim period between the controllerships of

Wilkinson and Pogson. It is common ground between the parties that Mr. Almeida took over at least some of the Controllershship functions during that period and demonstrated himself to be a valuable Chubb employee.

Although the decision to appoint a replacement for Mr. Pogson was eventually that of Mr. Davies, it is apparent that it would involve Mr. Weeks, the new General Manager, who assumed Mr. Baker's former responsibilities in October of 1974. It was Mr. Weeks' evidence that he did not give any consideration at all to Mr. Almeida as a possible replacement for Mr. Pogson. This is perhaps a bit surprising in view of the nature of Mr. Almeida's position with the company, his track record at Chubb and his qualifications. The explanation offered by Mr. Weeks for his disinterest in the prospects of promoting Mr. Almeida is that he didn't know very much about Mr. Almeida. He had had relatively little contact with him since arriving at Chubb in 1974. He had never read a resume of Mr. Almeida's and, indeed, Weeks professed not to realise that Almeida's official position was that of Assistant Controller.

Although counsel for the respondent has suggested that a skeptical and suspicious view should be taken of Mr. Weeks' disinterest in Mr. Almeida, I am not satisfied that there is any basis in the evidence for undermining the veracity of Mr. Weeks' statements on this point.

Mr. Davies did, however, consider Mr. Almeida as a possible replacement for Mr. Pogson and, accordingly, his reasons for rejecting this possibility again require close scrutiny. The explanation offered by Mr. Davies for his opinion that Mr. Almeida

was not suitable for promotion was that "although he was very technically capable, he didn't have the people skills to assume the controllership function at that time. It was an attitudinal problem." (Transcript, p. 993) The attitude was described by Mr. Davies (at p. 994) as "basically a negative, critical attitude" especially "directed at people in authority".

When asked on cross-examination to provide more specific information concerning these alleged problems with Mr. Almeida, Mr. Davies suggested that he understood that Mr. Almeida was having difficulty in getting along with Mr. Weeks and Mr. Ian Lockhart, the Plant Manager. On further questioning, however, Mr. Davies was unable to recall specific complaints registered by or conversations with either of these gentlemen concerning Mr. Almeida. Further, it must be noted that both Mr. Weeks and Mr. Lockhart testified in these proceedings and in neither case did they indicate that they had difficulty in getting along with Mr. Almeida during this period. Indeed, the evidence failed to disclose that either of these gentlemen had significant or extensive contact with Mr. Almeida prior to early 1976, nor was there any suggestion in the evidence of either that they had voiced concerns of any kind concerning Mr. Almeida to Mr. Davies.

Counsel for the respondent places heavy reliance on the fact that Mr. Davies also indicated that Mr. Almeida had made complaints to Mr. Davies during Mr. Pogson's controllership with respect to the quality of Mr. Pogson's work. This, it was argued, is substantial evidence underlying Mr. Davies' opinion that Almeida had a negative attitude toward his superiors. The evidence of Mr. Davies does not disclose, however, that he was particularly

concerned about these comments made by Mr. Almeida, nor did he indicate that he felt this behaviour on Mr. Almeida's part was particularly inappropriate, or that these opinions were particularly unfair as an assessment of Mr. Pogson's ability. Indeed, it seems most unlikely that Mr. Almeida's comments were either intended or received as substantial criticisms of Mr. Pogson. In reply, Mr. Almeida testified that he had spoken of Pogson to Davies only once and this in response to an overture from Davies. Almeida was guarded in his comments, according to his testimony, for he understood that Davies and Pogson were good friends.

In summary, the explanation offered by Mr. Davies for his rejection of Mr. Almeida as a candidate at this time is less than convincing. To the extent that the explanation rests on Mr. Almeida's difficulty in getting along with other management personnel, there appears to be no basis for such views. To the extent that the explanation rests upon an attitudinal problem, the only evidence in the record concerning contact between Mr. Almeida and Mr. Davies does not appear to have troubled Mr. Davies significantly or to have created a factual basis for an opinion of this kind.

Again, then, the reasons for not considering Mr. Almeida suitable for promotion appear to be pretextual in character. If Mr. Davies genuinely wished to make an assessment of Mr. Almeida's suitability for promotion, it is surprising that he did not make enquiries with Mr. Pogson to determine whether or not Almeida had performed successfully as Assistant Controller. Given the absence of, or at the very best, the frailty of any evidence weighing

against Mr. Almeida's suitability for promotion, the suggestion made on behalf of the complainant and the Commission by their counsel to the general effect that Mr. Davies was at this point reaching to find some non-discriminatory basis for a decision which rested ultimately on discriminatory grounds is very persuasive indeed. Having reached the conclusion that Mr. Davies was so motivated in rejecting the possibility of promoting Mr. Almeida at the time of the departure of Mr. Wilkinson, it is all the easier to reach the conclusion that Mr. Davies was similarly motivated at this juncture.

Perhaps I should add that there is some evidence that Mr. Almeida and Mr. Pogson had what appear to be minor disagreements with respect to such matters as pay increases and promotions. Although these matters received very close examination in the evidence of a number of witnesses, the substance of the matters in dispute is not such, in my view, as to reflect unfavourably on Mr. Almeida's performance. More importantly, however, there is no evidence to suggest that Mr. Pogson either harboured or communicated to Mr. Davies the feeling that Mr. Almeida had had an attitudinal problem of any kind.

IX. The Ross appointment

Mr. Bartlett was appointed to replace Mr. Pogson in March of 1976, but did not take up his responsibilities as Controller until May of that year. Again, during this interim period, Mr. Almeida was obliged to assume at least some of the responsibilities that would normally be handled by a Controller, and it is conceded

by the respondent that he ably discharged such responsibilities as were shouldered by him. Mr. Almeida's performance during the Bartlett controllership appears to have been uneventful. Mr. Almeida thought that he enjoyed good relations with Mr. Bartlett and there is nothing in the evidence led in these proceedings to suggest the contrary. Mr. Bartlett was promoted to another position within the Chubb organization a little more than a year after assuming his responsibilities as Controller in the Fire Division. Again, the possibility of promoting Mr. Almeida to Controller surfaced for consideration and again, the reasons for rejecting him as a suitable candidate require scrutiny.

The decision to appoint a new Controller was again essentially that of Mr. Davies, with the assistance of Mr. Weeks. As far as Mr. Weeks was concerned, Mr. Almeida was not a candidate at this time. Mr. Weeks appeared to suggest that one of his reasons for not considering Mr. Almeida as a candidate was that he had difficulties with one or two of his staff members. A Mr. Ali, who had left the company, forwarded a postcard after his departure in which he registered a strong complaint against Mr. Almeida. Mr. Weeks indicated that another employee had indicated that she was unhappy working with Mr. Almeida. It is not at all clear, however, that these considerations genuinely weighed heavily in the mind of Mr. Weeks. Neither of these incidents was investigated and, without further investigation, would not appear to be a very substantial basis for dismissing Mr. Almeida as a candidate. Mr. Almeida has supervised a significant number of employees over the years and surely it would be surprising if complaints of one

sort or another did not surface from time to time. Such complaints as surfaced at this time and subsequently with respect to the concerns of one or another of the employees were answered to my satisfaction either in the evidence of Mr. Almeida himself or in the evidence of other witnesses who were familiar with the individuals involved. It is not necessary to explore in detail the evidence relating to these incidents but it is sufficient to indicate that I am satisfied that in none of the incidents occurring prior to the appointment of Mr. Horner as Comptroller in September of 1978 did anything occur which reflected badly on Mr. Almeida's capacities as a supervisor.

It may be argued on behalf of the respondent, however, that the important question is not whether these incidents did in fact reflect badly on Mr. Almeida but rather whether Mr. Weeks might reasonably have believed them to do so and failed to consider Mr. Almeida as a candidate for promotion for this reason. On balance, it seems rather unlikely that these incidents would be considered so significant, without further investigation, by an individual who was open to the possibility of promoting Mr. Almeida. If Mr. Almeida was thought to be a possible candidate for promotion by Mr. Weeks for other reasons, it would be surprising if he would not make a few enquiries, perhaps say with Mr. Bartlett, concerning Almeida's ability to effectively supervise employees. The other reason suggested by Mr. Weeks for his failure to consider Mr. Almeida a candidate was simply that Mr. Bartlett had not recommended him.

As far as Mr. Davies is concerned, the problem with Mr. Almeida's candidacy was again said to be related to his difficulty in getting

along with the managers with whom he was dealing, more specifically, Mr. Lockhart the Plant Manager, Mr. Weeks the General Manager, and perhaps the Sales Manager as well, although Mr. Davies was unable to recall his name. (Transcript, p. 1033)

Again, the record of these proceedings does not yield evidence supporting these suggestions and the explanation proffered by Mr. Davies for rejecting Mr. Almeida as a candidate appears to be pretextual. Mr. Weeks indicated that he did not have much contact with Mr. Almeida during this period. Weeks did not articulate any difficulty he was aware of with Mr. Almeida's work or any problems he personally was having in getting along with him during this period. No other managers were called to testify with respect to this alleged difficulty.

Mr. Davies also indicated some concern about the fact that Mr. Bartlett was not prepared to recommend Mr. Almeida, and indeed suggested that he had a conversation to this effect with him. Yet, there is no evidence of a careful enquiry on the part of Mr. Davies into the suitability of Mr. Almeida for the job. Again, I am led to conclude that the reasons given for refusal to promote Mr. Almeida were pretextual in nature and that the decision to not promote him rested, in the main, on discriminatory grounds.

It may be noted that it was during this period that, as previously mentioned, Mr. Davies had a conversation with the recruiting agent who ultimately recommended the appointment of Mr. Ross to replace Mr. Bartlett, in which he indicated, in his own terms in a jocular fashion, that he did not favour the appointment of non-white candidates.

The appointment of Mr. Ross was not a success. It is common ground between the parties that Mr. Ross' work was unsatisfactory. Indeed, the respondent terminated Mr. Ross' employment as Controller in mid 1978. Mr. Almeida did complain to Mr. Davies with respect to the quality of Mr. Ross' work. Again, Mr. Weeks, in his evidence, did not seem particularly troubled by this intervention on Almeida's part and Mr. Davies did agree that Mr. Almeida's observations were accurate.

X. The Horner appointment

With the termination of Mr. Ross' tenure as Controller, a new appointment once again had to be made. The consideration of and ultimate rejection of the possibility of promoting Mr. Almeida was not essentially different in this instance than it had been on previous occasions. There were, however, some new features present to the decision-making process. Again, Mr. Weeks and Mr. Davies were responsible for the decision. Again, someone other than Almeida was appointed. Mr. Roland Horner was appointed Controller in September of 1978.

A new feature in this instance, however, was that Mr. Bartlett suggested that Mr. Almeida be considered as a candidate at this time. Mr. Weeks testified that Mr. Bartlett recommended to him that Almeida be seriously considered (Transcript, p. 615), although he did, in cross-examination, indicate that Bartlett's recommendation was expressed in a rather lukewarm fashion to the general effect that "You really could do worse" (Transcript, p. 662) than appoint

Mr. Almeida. I accept this evidence concerning the nature of Bartlett's remarks.

All parties attempt to draw support from the Bartlett recommendation. From the point of view of the complainant and the Commission, this is said to be strong evidence that a fair-minded assessment of Almeida's performance was that he was a suitable candidate for promotion. From the respondent's point of view, of course, the lukewarm nature of the recommendation is offered as support for the view that a reasonable person could refrain from promoting Almeida on grounds of merit alone.

My own view is that neither side can gain much from this incident. It is true that the Bartlett recommendation would be much more supportive of the complainant's position were it to have been more strongly stated. On the other hand, if we may assume that Bartlett was aware of the lack of enthusiasm previously demonstrated by Mr. Davies for promoting Almeida, it would not be surprising if he were to put forward his recommendation in a cautious manner. One's reputation for sound judgment might be placed at risk by strongly recommending someone thought by one's superior to be unsuitable for the job. To this extent, then, the Bartlett recommendation appears to offer little support to either side of this dispute.

There is, however, one respect in which the Bartlett recommendation is of some support to the complainant's position. It is evident that Bartlett, a trusted and successful executive in the Chubb organization, was of the view that Almeida was capable of filling the responsibilities of the Controller. Surely he would

not recommend a man whom he felt could not do the job. This fact, when coupled with what was conceded by the respondent to be a policy of promoting from within "where possible" leads one to wonder why it was not "possible" to promote Mr. Almeida. The Bartlett recommendation thus underlines the appropriateness of subjecting the respondent's explanations for its refusal to promote Almeida on this and other occasions to careful scrutiny.

A second new feature to this episode flows from the first, and that is that Mr. Weeks actually turned his mind to the question of whether Mr. Almeida was a suitable candidate for promotion. Mr. Weeks testified that his response to Mr. Bartlett was that "there was no way I could consider Mr. Almeida for the position" and that his reasons for this were as follows (Transcript, p. 616):

There were several reasons. There were situations where Mr. Almeida had difficulty with staff work relationships. Personally I had difficulties obtaining information, or at least data, by which I could get information, and at that time we were doing our budget for the following year and I did not feel that Mr. Almeida was willing to get involved in doing some of the things related to that budget and in supporting me, and basically I had to do most of that budget work myself.

It is urged on behalf of the complainant and the Commission that these reasons advanced by Mr. Weeks are pretextual in nature. A number of grounds have been suggested for this conclusion. First, with respect to Mr. Almeida's ability to get along with his fellow-workers, the collectivity of the evidence before this Board of Inquiry strongly suggests that the contrary was the case. Virtually all the witnesses who testified before this Board of Inquiry with

respect to their contact with Mr. Almeida prior to this point in time indicated no difficulty in getting along with Mr. Almeida. As has been previously indicated, it is true that there were rumoured difficulties with a couple of employees and it is the case that none of these employees did in fact testify. As I have indicated, however, I am satisfied that the substance of the disputes Mr. Almeida had with each of those employees did not reflect badly on his own supervisory skills. Nonetheless, it must be asked whether Mr. Weeks might have been genuinely troubled by these rumours to the point where he felt that Mr. Almeida's ability to work with others was sufficiently problematic as to make him unfit for promotion. Again, it would be surprising if Mr. Weeks was genuinely concerned about this aspect of Mr. Almeida's performance that he would not have made enquiries with respect to these particular incidents. As indicated previously with respect to Mr. Davies, the suggestion that Mr. Weeks was genuinely concerned that Almeida had a serious problem in getting along with other workers does not appear to be credible in the light of the overwhelming weight of the evidence in these proceedings relating to Mr. Almeida's performance in this regard, and the ease with which this concern could apparently have been removed.

With respect to the alleged problem of obtaining information from Mr. Almeida, the record is remarkably free of illustrations of this alleged phenomenon. Indeed, the substance of the evidence of almost every witness who had dealings with Mr. Almeida was that they experienced no problem in this regard. The concern voiced by

Mr. Weeks does draw some support from others, most particularly from the evidence of Mr. Weech, the Controller of Chubb Holdings North America Limited, a man who had some contact with Mr. Almeida throughout his appointment with the respondent and a man who appears to have a generally favourable assessment of Mr. Almeida's performance. Although Mr. Weech testified that he himself had no difficulty in getting information from Mr. Almeida, he identified a potentially problematic aspect of Mr. Almeida's performance in the following exchange on cross-examination (Transcript, p. 1310-1311):

Q: In that time, and especially subsequent to the time when you actually met Mr. Almeida, was there anything in his work that you thought might have disintitled him to the position of Controller?

A: The one observation I had, and I wouldn't use the term 'disintitled', but the one observation I had that might not have worked in his favour was on occasion when the Vice-President of Finance would want to know something right away and pick up the phone, if the Controller wasn't there he would invariably talk to the assistant controller and didn't always get straight answers, would get a guarded answer rather than, you know, understandable, rather than his being on the spot. Mr. Almeida sometimes would tend to hedge on an answer and that wouldn't go over well with Mr. Davies.

Q: Would he be present during these conversations?

A: Often.

Q: You wouldn't hear Mr. Almeida's portion of the conversation, would you?

A: No.

Q: Mr. Davies did not have a Speaker phone?

A: No. Some of the controllers used to give guarded answers too.

Q: I guess if you were not certain about the response or if the information has to be checked, it is

better to give a guarded answer than one that is not right.

A: But when he wants to know something, picks up the phone and calls, he is hoping for an answer, so it doesn't help your case if you won't stick your neck out a little bit.

There appears to be a typographical error in the transcript in so far as it suggests that the conversations in question took place between Mr. Weech and Mr. Almeida. The sense of the exchange is clearly that the conversations were between Mr. Davies and Mr. Almeida, and that Mr. Weech was present and listening to Mr. Davies' side of such telephone conversations. The picture portrayed, then, is one of Mr. Almeida being reluctant to respond as directly as Mr. Davies wished to these enquiries, and it may well be that it is this sort of concern that underlies Mr. Weeks' suggestion that he had difficulty getting information from Mr. Almeida. At the very least, it must be said, there is no significant evidence other than that of Mr. Weeks relating to this alleged problem.

Against this background, it is of interest to consider Mr. Weech's testimony with some care. First, it may be noted that Mr. Weech did not himself appear to consider this a serious problem. He indicated that this reaction of Mr. Davies would work against Mr. Almeida but he did not appear to think that this sort of response on Almeida's part was either inappropriate or uncommon. Other controllers gave similar answers, according to Mr. Weech. Second, it would appear that this alleged problem does not so much relate to the giving of information but to the giving of opinions or "sticking one's neck out a bit". The problem, if there was one,

was one of cautiousness or reluctance to speculate rather than uncooperativeness or reluctance to do the work necessary to provide accurate information. Thirdly, it should be noted that Mr. Weech's observations result from Mr. Davies' reactions to conversations which he, Davies, had with Almeida and with respect to which Weech overheard only Mr. Davies' comments. Mr. Weech had direct knowledge only of the fact that Mr. Davies was apparently concerned and had no knowledge of the substance of Mr. Almeida's replies or, therefore, any basis for assessing the legitimacy of Mr. Davies' concerns. Finally, Mr. Davies, who was all too quick to find reasons for refusing to promote Mr. Almeida, did not indicate in his evidence that concerns of this kind weighed heavily with him. For these reasons, I do not find the Weech testimony on this point to be very helpful to the respondent. On the record before me, then, it seems very unlikely that there was in fact a problem of "getting information from Mr. Almeida" which could have weighed heavily with Mr. Weeks in his decision that Almeida should not be considered a serious candidate for promotion.

The third factor mentioned by Mr. Weeks, Mr. Almeida's participation in the budget work of the late summer of 1978, is also problematic. In the first place, it would appear that this exercise occurred some months after the search for a replacement for Mr. Ross had commenced and some time after Mr. Weeks had concluded that he did not wish to have Mr. Almeida promoted to the job of Controller. Moreover, the allegations of Mr. Weeks concerning difficulties in this particular budget process are not borne out in the testimony of Mr. Lockhart, the Manufacturing Manager during this exercise. Thus, Mr. Weeks indicated that

Mr. Almeida was quite unhelpful with respect to the manufacturing budget. Indeed, Mr. Weeks suggested that Mr. Almeida "didn't do anything in regard to the manufacturing budget", notwithstanding the fact that he did have responsibility in this regard (Transcript, p. 862). On the other hand, the evidence of Mr. Lockhart was to the general effect that the budgeting process in 1978 was not any different from any other in terms of the involvement of Mr. Almeida and that he had no difficulty getting the usual sorts of information from him. Finally, it should be noted that during this period, Mr. Almeida was labouring under the misconception - intentionally induced by Weeks and Davies - that he was being considered a serious candidate for promotion to the controllership. It seems rather likely, therefore, that he would have applied himself conscientiously to his assigned responsibilities in an attempt to impress Mr. Weeks with his suitability for promotion.

In summary, on a careful review of the reasons advanced by Mr. Weeks for opposing Mr. Almeida's promotion, there appears to be no substance to them and accordingly they are not, on the balance of probabilities, the real reasons for his reluctance. Similarly unpersuasive is the suggestion elsewhere in Mr. Weeks' testimony that he had essentially two problems with Mr. Almeida's ability to carry out the controllership role (Transcript, pp. 629-630):

A: Well, the spirit of cooperation I could not see. The willingness to put forth that extra effort and do things that are above and beyond the normal statement. I would say those two things in particular.

Such considerations would not be irrelevant, in my view, nor of course would reliance upon them constitute a contravention of

the Code. However, if these did represent genuine concerns, it ought to have been possible to provide specific illustrations of these problems, especially in light of the fact that the evidence of Mr. Almeida's track record at Chubb suggests that he was an individual who was quite prepared to do work above and beyond the call of duty and one who was quite capable of getting along with and cooperating with others.

In any event, the decision to not promote Mr. Almeida at this time appears in the main to have rested with Mr. Davies, and it is principally for this reason that the assessment of this decision-making process is not markedly different from those previously considered. Mr. Davies indicated that on this occasion he really didn't consider Mr. Almeida a candidate at all inasmuch as "we had gone through that process a very short time before and nothing had really changed" (Transcript, p. 1005). Mr. Davies did say, however, that he thought if anything the situation had deteriorated inasmuch as he had some feedback from the General Manager, Mr. Weeks, to the general effect that Mr. Almeida's attitude was "terrible". Mr. Davies testified, however, that he placed 75% reliance on his own knowledge and only 25% reliance on reports from the General Manager. It cannot be argued, then, that whatever the merits of Mr. Weeks' views, they might have had an overbearing influence on Mr. Davies which would have avoided the necessity of him relying on his own impressions which, for the reasons earlier discussed, have been found to be motivated by a discriminatory bias. Accordingly, my finding with respect to this instance is in substance similar to those promotions previously considered, i.e., that the refusal

to promote Mr. Almeida or to seriously consider him for promotion appears to have been based on discriminatory considerations.

XI. The Almeida dismissal

Mr. Roland Horner was appointed Controller on September 7, 1978. Approximately eight months later, on May 8, 1979, Mr. Almeida's contract of employment with the respondent was terminated. There appears to be no room for significant doubt on the evidence that the decision to dismiss Almeida was taken by Horner and accordingly, the question which requires consideration is whether Mr. Horner, in taking this decision, was motivated by a discriminatory bias.

Although, as with all other aspects of the present dispute, the question is not free from difficulty, I am satisfied that the complainant has not established that, on the balance of probabilities, Mr. Horner was so motivated. There appears to be little doubt that Mr. Almeida's attitude towards his employer and towards his work had deteriorated after the decision was taken to appoint Mr. Horner. Mr. Almeida was evidently very frustrated at his lack of success and had apparently finally resolved that he would no longer fully cooperate with the incumbents of the Controller position. Mr. Almeida reported that he told Mr. Bartlett that "I am not any more going to train Controllers in this place and show them around. They should come and perform their job; I do mine." (Transcript, p. 144) and further, "I was not going to go out of my way to make a success of" another new Controller (Transcript, p. 338). Mr. Horner's evidence strongly suggests that Mr. Almeida lived up

to this undertaking.

It is also clear, however, that Mr. Horner was warned, at the time of his appointment, that Mr. Almeida's role in the accounting section was problematic. In particular, it was suggested that he had taken over too many responsibilities for himself and that consideration should be given to realigning them. It was the process of attempting to realign those responsibilities, undertaken by Mr. Horner, which would appear to have been the greatest source of friction between the two men. Considerable evidence was led in these proceedings with respect to the attempted creation of a job description for the Assistant Controller position. Suffice it to say that Horner and Almeida could not agree on a description. Mr. Almeida wanted to sign only a description which listed all of the responsibilities he had shouldered over the years together with a statement that the job represented "on the job training for a successor" (Exhibit 21). This was not acceptable to Horner. One cannot fail to be sympathetic to Mr. Almeida's concern that the job description drafted by Mr. Horner had the effect of reducing to some extent the importance of the actual job he had performed over the years and certainly undermined the expectation he had that successful performance as Assistant Controller should lead to serious consideration for promotion to the controllership. On the other hand, it is evident that from Mr. Horner's point of view, he was attempting to exercise what he saw as an appropriate management prerogative to confine Mr. Almeida's responsibilities and Mr. Almeida's response was, in turn, unreasonable and uncooperative.

Counsel for the complainant has argued that this exercise in realigning Mr. Almeida's responsibilities amounted to a constructive dismissal of Mr. Almeida. It is not necessary, however, for present purposes to resolve this question. Our only concern here is whether Mr. Horner was genuinely of the view that Mr. Almeida was an uncooperative employee and that he dismissed him for this reason rather than on the basis of a discriminatory bias.

Mr. Horner also indicated that he was concerned about Mr. Almeida's relationship with other employees. The long-standing feud between Mr. Almeida and Ms. Paula Wood had come to his attention and, although this dispute is one which I have obliquely referred to earlier as one which reflects no discredit on Mr. Almeida, I am also satisfied that Mr. Horner genuinely believed that there was room for concern with respect to Mr. Almeida's relationship with Ms. Wood. Further, there was some evidence that Mr. Almeida was somewhat uncooperative in responding to overtures for help in an accounts reconciliation exercise from Ms. Lydia Engels. Ms. Engels had been appointed Credit Manager in October, 1978, and saddled with the responsibility of reconciling the receivables accounts. Although Mr. Almeida had his own explanation for his unresponsiveness, I am satisfied that Ms. Engels genuinely felt that Mr. Almeida was not as helpful as he should have been and that this sentiment was shared by Mr. Horner.

Further, there was some evidence concerning work on year-end working papers which is revealing of Mr. Almeida's attitude during

this period. It was the evidence of Mr. Davies that new procedures were being brought into place to standardise these working papers in the various divisions. When asked if he had persisted in his own ways of doing things and simply ignored these new instructions, Mr. Almeida conceded that this was indeed so. (Transcript, pp. 327-329) Although it is not my view that this particular incident weighed heavily in Mr. Horner's decision to discharge Mr. Almeida - indeed, it is not clear that Mr. Horner would have been aware of the precise nature of Mr. Almeida's performance on the working papers until the discharge was at least decided upon - it is some evidence of Mr. Almeida's general attitude at this time that he simply adopted the view that he would not alter his practice to accommodate new corporate policy directives.

Mr. Horner communicated his concern to Mr. Almeida through the medium of a performance appraisal pertaining to Mr. Almeida's performance from March 1, 1978 to February 28, 1979 (Exhibit 18) and a subsequent conversation with Mr. Almeida concerning its contents. Mr. Horner's evidence, which I find to be credible, was that Mr. Almeida refused to concede that there might be any problem with his performance and indicated no willingness to change his attitude.

In short, the evidence concerning this period portrays a man who had become much embittered with his employer and, as a result, conducted himself in such a way as to appear quite uncooperative to his superior and, indeed, to create the impression of a man who was prepared to do only the minimum necessary to discharge his

responsibilities. Thus Mr. Horner and, indeed, others, testified to the general effect that Mr. Almeida from time to time read newspapers or other material during office hours and enjoyed unexplained absences from the office on a more or less frequent basis. While the evidence on these issues is not sufficiently clear as to be terribly helpful, I am satisfied that Mr. Almeida's attitude during this period was essentially negative and uncooperative and that this was, in one way or another, abundantly evident to Mr. Horner. Moreover, I am satisfied that it was this aspect of Mr. Almeida's performance, rather than considerations of a discriminatory nature, which led Mr. Horner to effect a dismissal of Mr. Almeida as of May 8, 1979.

XII. The compensation question

Having found that the respondent's actions in refusing to promote the complainant at the time of the appointments of Messrs. Pogson, Bartlett, Ross and Horner constitute a contravention of the Code, the question arises as to the appropriate level of compensation to be awarded under Section 14C (b) of the Code for the purpose of indemnifying the complainant for injuries resulting from these unlawful acts. It follows from the analysis set forth in Section VII of this award that inasmuch as the complainant has not satisfactorily established that he was fully qualified for the position at the time of the appointment of Mr. Pogson, no injury occurred at the time of that appointment. As the complainant was fully qualified at the time of the Bartlett appointment, however,

it follows that such compensation as should be awarded, would be calculated from the date of that appointment, described in the evidence as being March of 1976.

The formula for calculating Mr. Almeida's entitlement is easily ascertained. In human rights cases, as in labour arbitration cases, the general principles of the law of contract have been applied and accordingly, damages have been awarded in amounts which attempt to place the complainant, so far as an award of monetary damages can do so, in the position the complainant would have been in if the contravention of the Code had not occurred. In the present case, this objective is best attained by awarding the complainant the difference between the salary actually received during the period of time for which compensation is payable and the salary he would have received as Controller. It is my view that the best evidence of the salary he would have received during this period is the salary actually paid to the Controller pro tem during the period for which compensation is payable.

A final point of difficulty in calculating damages must be addressed. It is less than obvious when the period of entitlement to compensation should be taken to expire. It is the view of counsel for the complainant and the Commission, of course, that the complainant should be entitled to compensation from the initial point of discrimination through to the point in time, in fact July of 1979, when the complainant obtained new employment at a much enhanced salary level with another employer. It is my view, however, that a shorter period than this is appropriate.

As indicated in Section X of this award, it is my view that subsequent to the appointment of Mr. Horner, Mr. Almeida's work performance deteriorated dramatically and, indeed, provided a basis for Mr. Horner's decision to terminate his employment. It would, in my view, amount to excessive compensation to permit an individual such as the complainant in the present case to successfully claim compensation for a period of time during which his work performance was plainly unsatisfactory.

There is another possible reason for suggesting that compensation should not be payable subsequent to the Horner appointment, and this is that at some point in time - and, arguably, at the point at which the Horner appointment was made - Mr. Almeida assumed an obligation to mitigate his losses by seeking employment elsewhere. Once the duty to mitigate crystallized, the right to seek compensation would expire on the theory, perhaps, that injuries flowing after that point in time resulted from Mr. Almeida's failure to take such steps.

Were one not to impose a duty of this kind, the position of an individual such as the complainant who is not promoted over a period of a number of years on discriminatory grounds is considerably stronger than that of an individual who is dismissed for similar reasons. The individual who is dismissed in an unlawful manner appears to assume an obligation to mitigate his or her loss and to seek employment elsewhere. See, generally, Olarte et al. v. Commodore Business Machines Limited and DeFilippis (Ontario Board of Inquiry, Cumming, October 11, 1983 at pp. 84-85) and the cases

referred to therein. Unless a similar duty to mitigate is imposed on individuals who have been refused a promotion, it would follow that they could simply remain in the position from which they have not been promoted and seek damages from time to time for the difference between their current salary and what they would have received in the position to which they should have been promoted, subject of course to any principle of limitations which might be determined to apply. Thus, it may be argued in favour of the view that a duty to mitigate should be imposed in cases involving a refusal to promote, that it would remove this anomaly.

On the other hand, it may easily be seen that the imposition of such a duty may impose considerable hardship. An individual may not be at all confident that a refusal to promote was based on discriminatory grounds. Or, alternatively, the victim of discrimination may feel that the most prudent course of action is to remain with the present employer and attempt to earn the respect of those who are currently operating on the basis of discriminatory attitudes. Moreover, the individual may well fear that this problem is not one which is exclusive to his or her current employer but is a problem likely to be encountered elsewhere, and accordingly that there is no point in seeking employment at an equivalent level elsewhere in the hope that a promotion will ultimately be forthcoming. In circumstances such as these, one could easily understand that a reasonable victim of discrimination might not decide to attempt to minimise his or her losses by seeking employment with another employer.

In as much as counsel for the respondent has not pressed upon me the argument that such a duty to mitigate should be imposed,

I do not find it necessary to attempt an authoritative disposition of this issue in the present case. It is my view, however, that in order to maintain entitlement to compensation, the victim of a discriminatory refusal to promote must at the least continue at that level of diligent and responsible performance which the employer is entitled to demand of every employee. For the reasons advanced above, it is my view that Mr. Almeida did not continue to perform in this fashion after the appointment of Mr. Horner and accordingly, it is my view that his entitlement to compensation should terminate at the time of the Horner appointment.

In summary, it is my view that appropriate compensation for the complainant should be calculated as the difference between Mr. Almeida's actual salary and the salary which he would have received had he been paid at the level paid to Messrs. Bartlett and Ross for the period from the appointment of Mr. Bartlett in March, 1976 to the appointment of Mr. Horner on September 7, 1978. During the interval between the promotion of Mr. Bartlett and the appointment of Mr. Ross, compensation should be calculated on the basis of an assumption that Mr. Bartlett's last salary level as Controller would continue until the Ross appointment and a similar assumption would apply to the calculation of the amount payable during the period from the termination of Mr. Ross until the appointment of Mr. Horner, i.e., that the Controller would continue to receive the salary last paid to Mr. Ross during that period.

XIII. Other remedies

Several other remedies were sought by counsel for the complainant and the Commission. A request was submitted for an award of general damages in the amount of \$10,000. Although it was not clearly indicated by counsel whether this award was to represent either injury to reputation or injury to feelings or so-called psychic injury, it is sufficient for me to indicate that I am not satisfied that an evidentiary basis for the existence of an injury of either kind was established in these proceedings.

Further, counsel for the complainant and the Commission argued that an order should be made permitting the Ontario Human Rights Commission to monitor all promotions made by the respondent for a period of two years. Although Mr. Millward appeared to be willing to recast this request in terms of a monitoring process relating only to executive level decisions, I am again satisfied that no sufficient evidentiary basis for an order of this kind has been established in the present proceedings. Although there was some attempt to indicate that one individual other than Mr. Almeida was affected by a discriminatory decision of a similar kind, I am not persuaded that the evidence concerning this particular incident established the existence of bias. More generally, there is no evidence in the record of these proceedings to suggest that the respondent was, as a general matter of policy, engaging in discriminatory practices at any level. The evidence in these proceedings related essentially to the decision-making of one individual and this is not, in my view, a sufficient basis

for the imposition of a more comprehensive order of the kind requested.

Finally, counsel for the complainant and the Commission has asked for relief in the form of a requirement that the respondent write a letter of apology to the complainant, that it write a letter to the Commission indicating that it will comply with the Ontario Human Rights Code in future and finally, that it will post the Commission's declaration of equal employment opportunity cards in prominent places on its premises. With respect to the letter of apology, although I am of the view that such a letter would be most appropriate in the present circumstances, it is not my view that much is gained by ordering individuals to express sentiments which may not be genuinely felt, and I therefore prefer to leave that matter within the discretion of responsible officials of the respondent.

With respect to the other items requested, again the absence of evidence relating to more widespread practices suggests that such orders would be excessive in the present case and difficult to justify under Section 14c (b) as an order requiring the respondent to "do any act or thing that, in the opinion of the Board, constitutes full compliance with" the offended provision of the Code.

XIV. The Order

This Board of Inquiry, having found the respondent to be in breach of Section 4 of the Code, for the reasons given, hereby orders the following:

The respondent is liable to pay to the complainant Almeida forthwith an amount representing the difference between the salary received by Mr. Almeida for the period from the appointment of Mr. Bartlett as Controller in March of 1976 to the appointment of Mr. Horner as Controller in September of 1978 and the salary he would have received if he had been paid at the rate paid to incumbents of the position of Controller of the respondent during this period.

Although it is anticipated that the parties, upon reading section XII of this decision, should have no difficulty in complying with the terms of this Order, this Board of Inquiry remains seized of jurisdiction in this matter for a further sixty days to dispose of any difficulties that might arise in the implementation, and will convene a hearing to consider any issue related to the implementation of the Order if requested by counsel for any party to do so.

DATED at Toronto this 15th day of March, 1984.



John D. McCamus

